MISSOURI COALITION FOR THE ENVIRONMENT ET AL.

IBLA 92-392 et al. Decided October 23, 1992

Appeals from a decision of the Assistant District Manager, Division of Solid Minerals, Milwaukee District, Eastern States, Bureau of Land Management, approving a mineral exploration plan. ES-19219 and ES-19220.

Affirmed.

1. Rules of Practice: Appeals: Timely Filing

   A notice of appeal will not be considered untimely filed under 43 CFR 4.411(a) where there is proof that it was mailed in sufficient time to have been received by BLM within the required 30-day period and in fact it was received within that period by the named adverse party, and the only evidence of receipt by BLM is a handwritten notation by an unidentified individual on the appeal notice.

2. Environmental Quality: Environmental Statements--Mineral Lands: Environment--Mineral Lands: Prospecting Permits--Minerals Exploration--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   BLM properly approves a plan for the drilling of a series of holes for the purpose of identifying the presence and extent of lead mineralization where it has adequately considered the impact of such drilling and associated activity on the environment, and
   determined that, given certain mitigation measures, any impact will be insignificant. BLM need not consider the impact of full-scale mining where approval of drilling does not commit BLM to approve further mining.

APPEARANCES: R. Roger Pryor, Executive Director, Missouri Coalition for the Environment, St. Louis, Missouri, for the Missouri Coalition for the Environment; Greg and Marsha May, pro sese; Laura E. Hansen, pro se; Peggy J. and Emmett D. Ross, pro sese; Cari King, Membership Chairman, Natural State Water Protection Association, Pocahontas, Arkansas, for the Natural State Water Protection Association; Thomas N. and Bonita K.

Stroud, pro sese; Nick Wilson and Michael K. Davis, pro sese; Julianne H. Sallee, pro se and for General Federation of Woman's Clubs, Arkansas; Becky Horton, Secretary, Ozark Mountain Center for Environmental Education, Alton, Missouri, for the Ozark Mountain Center for Environmental Education; George D. Oleson, Esq., for the Sierra Club, Arkansas Chapter; Daniel Lehocky, Conservation Chairman, Ozark Chapter/Sierra Club, St. Louis, Missouri, for the Ozark Chapter/Sierra Club; Kitty Cone, Chairperson, Local Committee for a Lead Free Ozarks, Alton, Missouri, for Local Committee for a Lead Free Ozarks; Arnold M. Jochums, Esq., Office of the Attorney General, State of Arkansas, for the State of Arkansas; Joseph J. Hansen, pro se; Becky Horton, Secretary, Waste Information Network, Glenwood, Missouri, for Waste Information Network; Sharon Rogers, Chairwoman, State Coordinating Organization of Missourians Against Hazardous Waste, Wright City, Missouri, for State Coordinating Organization of Missourians Against Hazardous Waste; Guy R. Martin, Esq., Donald C. Baur, Esq., Washington, D.C., for the Doe Run Company; Natalie Eades, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Missouri Coalition for the Environment (MCE) and others have appealed from a decision of the Assistant District Manager, Division of Solid Minerals, Milwaukee District, Eastern States, Bureau of Land Management (BLM), dated March 12, 1992, approving a plan by the Doe Run Company (Doe Run) to drill exploratory holes in furtherance of hardrock preference right lease applications (PRLA), ES-19219 and ES-19220. 1/ On July 10, 1990, Doe Run submitted a plan to drill up to 20 exploratory holes seeking lead and associated minerals on 1,580 acres situated in secs. 2, 3, and 11, T. 25 N., R. 4 W., Oregon County, Missouri, near the Missouri border with Arkansas. The land was acquired by the United States for forest purposes pursuant to the Act of March 1, 1911 (Weeks Act), ch. 186, 36 Stat. 961 (1909-1911). Drilling was intended to determine the exact extent and nature of any potential mineralization by extracting core samples at depth over a wide area.

Doe Run's proposed exploration is intended to obtain data about the presence of lead in order to comply with a request by the Forest Service

1/ The other appellants are Greg and Marsha May (IBLA 92-393); Laura E. Hansen (IBLA 92-394); Peggy J. and Emmett D. Ross (IBLA 92-395); Natural State Water Protection Association (NSWPA) (IBLA 92-396); Thomas N.
and Bonita K. Stroud (IBLA 92-397); Michael K. Davis and Nick Wilson (IBLA 92-398), General Federation of Woman's Clubs, Arkansas (Federation) (IBLA 92-399); Ozark Mountain Center for Environmental Education (Center) (IBLA 92-400); Sierra Club, Arkansas Chapter (SC-Arkansas) (IBLA 92-401); Ozark Chapter/Sierra Club (SC-Ozark) (IBLA 92-402); Local Committee for
a Lead Free Ozarks (Local Committee) (IBLA 92-403); State of Arkansas (IBLA 92-404); Joseph J. Hansen (IBLA 92-405); Julianne H. Sallee (IBLA 92-422); Waste Information Network (WIN) (IBLA 92-423); and State Coordinating Organization of Missourians Against Hazardous Waste (SCO) (IBLA 92-424).

for more precise information regarding anticipated lead mining operations. This information would also be used by BLM to decide whether the area covered by Doe Run's PRLA's encompasses a valuable mineral deposit. See 43 CFR 3562.1. Doe Run summarizes the plan as follows:

> During the first phase of the Plan, ten holes would be drilled. Each hole would consist of: an 8.75 inch diameter hole through overburden (to about 400 feet) with a 7.5 inch metal casing; a 6.25 inch diameter hole to the top of the Derby-Doe Run Formation (about 1,300-1,400 feet) with a 3 inch metal casing; and a 1.9 inch diameter hole through the Derby-Doe Run, Davis and Bonneterre Formations to remove a 1.5 inch diameter core (to about 2,200-2,300 feet). An area no larger than 100 feet by 100 feet will be cleared at each drill site. Approximately 1/4 mile of existing roads will be opened for access, and about 1/3 mile of new temporary roads will be constructed. The drill sites and new roads will be reclaimed after drilling. Drilling at each site is expected to take from six weeks to four months. Drilling at the various sites can occur simultaneously. If the first ten holes show promising mineralization, up to an additional ten holes will be drilled using the same approach.

(Consolidated Answer at 10-11).

In order to assess the environmental impact of the proposed exploratory drilling and reasonable alternatives thereto, BLM and the Forest Service jointly prepared an Environmental Assessment (EA) in January 1991. The purpose of the EA was to determine, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.
§ 4332(2)(C) (1988), whether preparation of an Environmental Impact Statement (EIS) was needed because drilling would create a significant environmental impact. The EA was tiered to (incorporated by reference) a Final EIS (FEIS) prepared to assess the environmental impact of mineral leasing in the 119,000-acre Mark Twain National Forest and to the
FEIS prepared for the Land and Resource Management Plan for the National Forest. See EA at 26.

On April 5, 1991, the District Ranger, Eleven Point Ranger District, Mark Twain National Forest, Forest Service, issued a "Decision Notice and Finding of No Significant Impact (FONSI)," concluding that the proposed exploratory drilling would not require preparation of an EIS because there would be no significant environmental impact. He also decided that the Forest Service would consent to the proposed drilling, subject to inclusion of certain stipulations in BLM's drilling authorization. Appeals were taken from the District Ranger's April 1991 decision to the Forest Supervisor, Mark Twain National Forest, Forest Service. Those appeals were denied on October 22, 1991. Subsequent appeals to the Regional Forester, Eastern Region, Forest Service, were denied on December 17, 1991.

The District Ranger notified BLM on January 3, 1992, that the Forest Service consented to the modified exploratory drilling plan. Thereafter,

protests against approval by BLM of the exploration plan were filed by appellants Greg and Marsha May, Laura E. Hansen, Peggy J. and Emmett D. Ross, Davis, Wilson, Sallee, and the State. The Assistant District Manager issued his Decision Record and FONSI on March 12, 1992, approving Doe Run's plan for exploratory drilling, subject to 10 Forest Service stipulations and 2 BLM stipulations. He concluded that, because approval of drilling would not result in any significant environmental impact, preparation of an EIS was not required.

The Assistant District Manager's March 1992 decision was appealed to the Board. Doe Run and BLM request the Board to consolidate the individual appeals. The request to consolidate is opposed by appellants. Because all the appeals involve the same BLM action, and raise similar legal issues, we consolidate all the appeals for decision by the Board. This means that all of the appeals will be disposed of in one proceeding rather than in separate decisions. It plainly does not mean that the appeals will be treated as "one appeal" (MCE's Objection to Motions at 2). Rather, each appeal will be adjudicated on its merits. All of the issues raised by appellants, either collectively or singly, are addressed by this opinion. We also expedite consideration of the appeals.

Because we here decide the instant case, it is unnecessary for us to act on Doe Run's motion to dissolve the automatic stay of the Assistant District Manager's March 1992 decision approving exploratory drilling. That stay has been in effect throughout the pendency of this appeal pursuant to 43 CFR 4.21(a). Doe Run may now proceed to fulfill its plan, the approval of which is affirmed by this decision, for reasons stated below.

Doe Run contends that except for appeals filed by MCE, Laura E. Hansen, SC-Ozark, and Local Committee, all of the appeals should be dismissed because the appellants failed to exhaust administrative remedies by first seeking adjudication by the Forest Service. Contrary to this assertion, administrative review of adverse BLM decisions by the Board is not dependent on exhaustion of administrative remedies before the Forest Service. BLM has its own responsibility regarding the approval of exploratory drilling within the National Forest, and our review will be confined to the propriety of the exercise of that responsibility.

Doe Run also requests the Board to dismiss the appeal of SC-Arkansas because it failed to serve Doe Run with a copy of its notice of appeal, as required by 43 CFR 4.413(a). That regulation requires an appellant to serve a copy of a notice of appeal on each adverse party named in the decision appealed from. Since Doe Run was an adverse party named in the Assistant District Manager's March 1992 decision, SC-Arkansas was required to serve a copy of its notice of appeal on Doe Run. The record establishes that Doe Run was not served. Failure to serve a notice of appeal, however, merely subjects an appeal to summary dismissal. 43 CFR 4.402 and 4.413(b). We will not dismiss an appeal for failure to serve an adverse party absent a demonstration that the party has suffered prejudice as a result. Red Thunder, Inc., 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990). Doe Run

has made no showing of prejudice. The motion to dismiss the appeal of SC-Arkansas is denied.

[1] Both Doe Run and BLM have filed motions to dismiss the appeals of SC-Ozark and Local Committee for failure to file timely notices of appeal in accordance with 43 CFR 4.411(a). SC-Ozark, Local Committee, and MCE oppose the motions to dismiss. Under 43 CFR 4.411(a), a person desiring to appeal a BLM decision must file a notice of appeal with BLM "within 30 days after the date of service" of that decision. Id. A delay in filing a required document will be waived "if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR 4.401(a).

Failure to file a notice of appeal timely leaves the Board without jurisdiction to decide the appeal under 43 CFR 4.411(c) and requires that the appeal be dismissed. See, e.g., Lew Landers, 109 IBLA 391, 392 (1989). It is therefore immaterial that the party appealing may have made a good faith effort to comply with the appeal regulation, the appeal has merit, or no party was prejudiced by the late filing, since the Board cannot overcome the effect of 43 CFR 4.411(c). See ANR Production Co., 118 IBLA 338, 343 (1991).

In the case of SC-Ozark, the record establishes that it was served with a copy of the Assistant District Manager's March 1992 decision on March 18, 1992. Therefore, the deadline for filing was April 17, 1992. SC-Ozark's notice of appeal was transmitted on April 13, 1992, well before the deadline for filing. It should have been filed shortly thereafter, again within the filing deadline. Indeed, the record indicates that the notice of appeal was received by Doe Run on April 15, 1992. The only proof regarding when the notice of appeal was filed with BLM is a handwritten notation on the document indicating that it was received by an individual with the initials "PFT" on April 29, 1992. There is no date-stamp by BLM. Nor is there anything to indicate that this individual was acting for BLM. We are not persuaded by this record that the filing was late. Cf. Milton E. Kutil, 104 IBLA 396, 397-98 (1988); Willis L. Lawton, 36 IBLA 178, 179-80 (1978). We therefore deny the motions to dismiss SC-Ozark's appeal.

In the case of Local Committee, the record establishes that it was served with a copy of the Assistant District Manager's March 1992 decision on March 13, 1992. Therefore, the deadline for filing was April 13, 1992 (since the 30th day following service of the decision fell on a Sunday). See 43 CFR 4.22(e). In contending that the Local Committee's notice of appeal was not filed timely, Doe Run and BLM refer to a notice of appeal which was filed with the Eastern States Office on April 17, 1992, having been postmarked on April 16, 1992. While it was received within the 10-day grace period, it was not transmitted to BLM within the 30-day period. Therefore, the delay in filing that document cannot be waived under 43 CFR 4.401(a).

Local Committee, however, asserts that it originally filed its notice of appeal with the office of the Assistant District Manager in Rolla, Missouri, on April 6, 1992, well before the deadline for filing. The record substantiates that claim. While the document was mailed on April 6 (as evidenced by a certified mail receipt provided by Local Committee), it was received by BLM on April 7. That was well within the deadline for filing. In addition, the filing was made "in the office of the officer who made the decision," i.e., the Milwaukee District Office (not the Eastern States Office), as required by 43 CFR 4.411(a). See Thelma M. Eckert, 120 IBLA 367, 370 (1991). We therefore deny Doe Run's and BLM's motions to dismiss these appeals.

Doe Run also requests the Board to dismiss the appeals of MCE, Greg and Marsha May, Laura E. Hansen, Peggy J. and Emmett D. Ross, NSWPA, Thomas N. and Bonita K. Stroud, Federation, Center, SC-Arkansas, SC-Ozark, Local Committee, State, Joseph J. Hansen, Sallee, WIN, and SCO, alleging that they lack standing to appeal under 43 CFR 4.410(a) because they either are not adversely affected or have failed to demonstrate that they are adversely affected by the Assistant District Manager's March 1992 decision approving Doe Run's exploratory drilling. In addition, Doe Run requests the Board to dismiss the appeals of NSWPA, Thomas N. and Bonita K. Stroud, Federation, Center, SC-Arkansas, Joseph J. Hansen, and WIN because they are not parties to the case. BLM joins in calling for the dismissal of the appeals of MCE, Federation, SC-Arkansas, SC-Ozark, Local Committee, Joseph J. Hansen, Sallee, WIN, and SCO.

In order to have standing to appeal a BLM decision, a person must be both a "party to [the] case" and "adversely affected" by the decision, as required by 43 CFR 4.410(a). See Storm Master Owners, 103 IBLA 162, 177 (1988). A person who is the responsible party who has taken the action that is the subject of the BLM decision on appeal, is the object of that decision, or has otherwise participated in the decisionmaking process leading to that decision will be considered a "party to [the] case." See Stanley Energy, Inc., 122 IBLA 118, 120 (1992), and cases cited therein. A person will be deemed adversely affected by a BLM decision, within the meaning of 43 CFR 4.410(a), for purposes of establishing standing to appeal if a legally cognizable interest is shown that may be adversely affected by the decision. See Donald K. Majors, 123 IBLA 142, 143 (1992). It is sufficient that the appellant raises "colorable allegations of injury." Powder River Basin Resource Council, 124 IBLA 83, 89 (1992); California State Lands Commission, 58 IBLA 213, 217 (1981). Greg and Marsha May, Laura E. and Joseph J. Hansen, Peggy J. and Emmett D. Ross, and Thomas N. and Bonita K. Stroud have established standing to appeal with their assertion that they may be adversely affected by any degradation in the quality of surface and groundwater that might result from BLM's approval of exploratory drilling within the National Forest, an objection they raised prior to issuance of the decision here under review. See Dorothy A. Towne, 115 IBLA 31, 35 (1990); Desert Survivors, 80 IBLA 111, 113 (1984). It is not necessary that they prove that degradation will occur and that they will in fact be adversely affected thereby. See Donald K. Majors, supra at 145. The threat of such degradation and its effect on appellants must, nonetheless, be more than hypothetical. See George Schultz, 94 IBLA 173,

178 (1986). We hold that it is, because there is evidence that the groundwater which will be intersected by drilling continues under appellants' land or feeds surface water which flows by their land and is used by them.

In the case of the State, we conclude that an interest of the State may be adversely affected by any degradation in the quality of water within the State since, at the very least, the State may be called upon to clean it up. This is sufficient to establish the State's standing. See State of California, 121 IBLA 73, 113, 98 I.D. 321, 343 (1991), appeal filed, California Coastal Commission v. U.S. Department of the Interior, No. S-92-702 GEB GGH (E.D. Cal. Apr. 28, 1992). We also conclude that NSWPA has adequately indicated that it may be adversely affected by the Assistant District Manager's March 1992 decision. Along with its notice of appeal, it has provided a list of its members. Among them are a number of the other appellants such as the Mays, who have already shown they have standing to appeal. This is sufficient to establish the standing of the organization of which they are members. See In re Pacific Coast Molybdenum Co., 68 IBLA 325, 332, 333-34 (1982). With the establishment of the standing of this group to maintain this appeal, it is apparent that we must consider the matter on the merits, and that no further purpose would be served by a detailed examination of the credentials of the remaining appellants. See Dorothy A. Towne, supra at 35 n.2. We have considered the arguments advanced by BLM and Doe Run and conclude that, even assuming that none of the remaining appellants may have standing, no effective change in the posture of this appeal would result. Accordingly, in the interest of administrative economy and furtherance of the request to expedite consideration of this appeal, the remaining arguments concerning standing are rejected as immaterial.

[2] Appellants contend that the EA inadequately failed to consider various anticipated impacts to the environment from the proposed exploratory drilling in conjunction with mineral development and that an EIS should have been prepared. They argue that BLM improperly limited the scope of the environmental review to consider only the effect of drilling exploratory holes. We find no error in the decision to focus the EA on the environmental impact of proposed drilling. See Decision Record, Appendix 2, at 1. Full mineral development of the subject land for mining and milling purposes may only be authorized upon issuance of a preference right lease to Doe Run. Moreover, issuance of a lease constitutes a commitment by BLM to authorize development in some form and at some time within the leased area. Cf. Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983) (oil and gas lease). It is when leasing is proposed that the environmental consequences of development must be considered under NEPA.

A lease will not be issued automatically at completion of Doe Run's approved exploration operations. At the very least, issuance of a lease will be preceded by another environmental review. See EA at 9, 67. In the course of deciding whether to issue a lease, BLM will consider the environmental impact of mineral development. See Uintah Mountain Club, 116 IBLA 269, 272 (1990). No decision has yet been made by BLM to issue a lease to Doe Run. Should the exploration now authorized discover lead

of commercial quality, in commercial quantities, and in a place that permits economical extraction, BLM will be required to issue a lease and then to permit mineral development in some form. See 43 CFR 3563.3; Lucky II Mines, 102 IBLA 55, 65 (1988). There has not yet been any demonstration of the existence of a valuable mineral deposit, which would require issuance of a preference right lease and obligate BLM to permit some form of development. Nor can any such demonstration likely be made until the conclusion of exploratory drilling. Therefore, no commitment to authorize development has occurred by virtue of the authorization of such drilling. BLM may properly defer any assessment of the environmental consequences of mineral development until after discovery of a valuable mineral deposit and prior to issuance of a lease. See John A. Nejedly, 80 IBLA 14, 20 (1984).

If there is to be mining in the National Forest, the Forest Service must also consent to leasing for mineral development. See 43 CFR 3500.9-1(b). That the Forest Service has consented to exploratory drilling does not mean that it must also consent to leasing. See EA at 9.
Doe Run's prospecting permits state that "issuance of any lease * * *
will be conditioned upon the prior rendition of an environmental impact assessment in accordance with [NEPA], the findings of which shall determine whether * * * the lease may issue." Id. (emphasis added). Such a stipulation is proper. See Stanford R. Mahoney, 12 IBLA 382, 388 (1973). We therefore conclude that BLM was not now required to consider the potential impact to the environment from issuance of preference right leases
to Doe Run. Insofar as appellants contend that BLM failed to adequately consider the environmental impact of mineral development in conjunction
with exploratory drilling, we find that they have failed to establish error.

Appellants assert that BLM failed to adequately consider the environmental impact of exploratory drilling on surface and groundwater quality, wetlands, and threatened and endangered species. Of most significance to appellants is the perceived threat to the quality of surface and groundwater from the drilling of 10 to 20 holes and associated activity (including roadbuilding) on the subject land. They assert that drilling may cause the release of lead into the groundwater, owing to the unusual "Karst" topography of the subject land, in which the underlying rock is characterized by caves and other subterranean voids. This circumstance, it is argued, will permit contamination of ground and surface waters including the Current and Eleven Point rivers. In addition, appellants fear that drilling fluids and other pollutants left on the land, sediments coming from disturbed land, and herbicides used to control weeds around drill sites and roadways will make their way into surface and groundwaters as a result of drilling and associated activity. Some appellants own land which is underlain by that groundwater or is downstream from the area to be drilled so that any contamination, they fear, would threaten their
health and livelihood inasmuch as they use the water for drinking, farming, grazing, and other purposes.

The record establishes that BLM adequately considered the potential impact on the quality of both surface and groundwater as a result of proposed drilling. See EA at 28-32, 34-44. Moreover, the approved exploration plan contains mitigating measures designed to reduce any such impact. The plan calls for fully casing the well holes. See Exploration Plan at 4, 5. Moreover, BLM provides for protecting surface water and surface exposures of groundwater from soil runoff, capturing toxic drilling fluids in a containerized system for disposal at a State-licensed waste disposal site, isolating lubricants used in drilling operations (by "diapering" the rigs
or other acceptable means), monitoring water quality, daily unscheduled inspections by Forest Service inspectors, and sealing the well holes
upon abandonment. See Decision Record at 2, 3, 4; EA at 23, 24. There
is no evidence that these mitigating measures will prove to be inadequate to render any impact to the environment in terms of water quality insignificant.

The record indicates that BLM was aware of the unusual "Karst" topography of the subject land, characterized by subterranean voids. See Draft EIS ("Hardrock Mineral Leasing, Mark Twain National Forest, Missouri") at 29; EA at 88. The danger is that drilling will open these voids to the surface, and allow surface water to bring contaminants into the groundwater where they can disperse throughout the aquifer. BLM has considered this danger and made provision to guard against it since the approved exploration plan calls, in cases where a well hole encounters a cave, for either casing a well hole through the void or abandoning the hole. See Exploration Plan at 4; EA at 40. Appellants have offered nothing to indicate that this measure will not be adequate to protect the quality of the surface and groundwater and render any impact insignificant.

BLM has also considered the possibility that drilling may cut through and link two separate aquifers that possibly underlie the subject land, so as to allow lead or other contaminants released as a result of drilling to be communicated between the aquifers. BLM has made provision for this contingency by planning for fully casing well holes during drilling operations and sealing the holes at abandonment where they pass through the affected formations. See Exploration Plan at 4, 5; Decision Record at 3; EA at 35, 39, 41-42. Appellants have offered nothing to indicate that these measures will not be adequate to protect the quality of the surface and groundwater and render any impact insignificant.

Davis and Wilson argue that, because studies are being undertaken by certain Federal agencies and others regarding the potential impact to water quality from mineral exploration, BLM should defer any decision regarding exploration until the results of such studies are obtained. The precise nature of such studies is not identified by appellants. The record indicates that Federal agencies and others are monitoring the quality of water, studying the structure and function of the major spring system (Big Spring), and inventorying and mapping caves (all in the area of the proposed drilling). See EA at 7. While these studies may ultimately provide valuable

data, there is no evidence that BLM lacks the information needed to assess the environmental risks attendant to the proposed drilling. BLM is aware of the potential risk to water quality from mineral exploration, has taken appropriate steps to protect such quality, and is justifiably satisfied that no further investigation is needed. See Decision Record, Appendix 2, at 2. Therefore, we find no error in BLM's decision not to defer action on the drilling proposal. See State of Alaska v. Andrus, 580 F.2d 465, 473-74 (D.C. Cir.), vacated in part on other grounds sub nom., Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978); Dorothy A. Towne, supra at 38-39.

It must be recognized that the aquifer underlying the subject land supplies water to individuals south of the National Forest and that it feeds surface waters which are used for recreation, farming, grazing, and other purposes by those individuals and others. Clearly, any contamination of the aquifer from lead mining could have disastrous consequences. In addition, any contamination by other substances would adversely affect the user population. There is no evidence, however, either in the record or offered by appellants, that contamination will result from the permitted exploratory drilling and associated activity. BLM has considered that risk and taken steps to prevent it.

Appellants state that the National Park Service (NPS) has petitioned the Environmental Protection Agency (EPA) to designate, pursuant to section 2(a) of the Safe Drinking Water Act, 42 U.S.C. § 300h-3(e) (1988), the aquifer underlying the subject land a "sole source aquifer," i.e., the sole or principal source of drinking water for an area which, if contaminated, would create a significant public health hazard. They argue that BLM should defer a decision on approval of Doe Run's exploration plan pending action on the petition. NPS seeks designation of the aquifer underlying the subject land as a sole-source aquifer because the Ozark National Scenic Riverways, a unit of the National Park System, receives water from the aquifer and would be adversely affected by water degradation. Designation precludes any project which may contaminate such an aquifer through a recharge zone so as to create a significant public health hazard from receiving Federal financial assistance. See 42 U.S.C. § 300h-3(e) (1988). While evaluating alternatives to approval of the exploration plan proposed by Doe Run, BLM considered whether to defer decision on the plan pending action on the NPS petition. BLM concluded that deferment was unnecessary because designation of the aquifer would not affect a decision whether to approve the plan since that decision would not involve the transfer of Federal financial assistance to Doe Run. See EA at 14. This analysis was correct. Approval of Doe Run's plan would not transfer any Federal financial assistance to the company. Thus, it does not matter, for purposes of deciding whether to approve the plan, whether the aquifer is designated or not. Because no purpose would be served by waiting for EPA action on the NPS petition, we find no fault with BLM's decision to proceed to decision without further delay.

The record also establishes that BLM adequately considered the potential impact of exploratory drilling on wetlands, finding that wetlands in the area of the proposed drilling (particularly Flat, Brushy, and Tupelo Gum ponds) are separated from groundwater and the surface waters of near

by proposed drill sites and that no impact is anticipated. See EA at 38, 42. Further, BLM provided for protection of wetlands by prohibiting drilling in wetlands or within a 300-foot buffer zone surrounding them. See Decision Record at 4; EA at 23, 25. Appellants have provided nothing to indicate that BLM has failed to adequately consider the potential impact of drilling on wetlands or make adequate provision for the protection of wetlands.

An EIS is required in every case where a Federal agency proposes to engage in a major Federal action that might "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). We may affirm a BLM decision finding that any impact would not be significant and that preparation of an EIS is not required if BLM has taken a hard look at the situation, identified relevant areas of environmental concern, and made a convincing case either that impacts would be insignificant or, if significant, would be reduced to insignificance by mitigating measures. See Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991), and cases cited therein. Appellants have presented no evidence to show that the proposed exploratory drilling poses any real threat to the environment. They simply assert that drilling and associated activity will negatively impact the environment. This assertion is not sufficient to rebut BLM's conclusion in the EA that no threat exists nor does it establish that any threat in fact exists.

The record bears out the conclusion that BLM identified relevant areas of environmental concern in connection with the proposed exploratory drilling, took a hard look at all of the potential impacts to the environment from that drilling, and demonstrated that any impact would either be insignificant or reduced to insignificance by defined mitigating measures. Appellants have provided no evidence to the contrary. At best, they express a difference of opinion, which is not sufficient to establish error. See Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992). Therefore, we conclude that BLM adequately considered the impact to the environment from the proposed drilling and properly declined to prepare an EIS.

The State contends that BLM failed to abide by the requirement of 40 CFR 1508.13 that a FONSI include the EA or a summary thereof. While the Assistant District Manager's FONSI was deficient in this respect, it did make reference to the EA, which had already received wide circulation. This deficiency did not render the EA inadequate or vitiate the Assistant District Manager's conclusion that the proposed drilling will not have a significant environmental impact. Rather, this is a trivial violation that does not compromise the integrity of the NEPA process and may not be used to overturn it. See 40 CFR 1500.3; Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 616 (1991); Powder River Basin Resource Council supra at 95.

Laura E. Hansen asserts that, by approving exploratory drilling, BLM has violated the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531-1544 (1988). BLM, with the assistance of the U.S. Fish

and Wildlife Service (FWS), concluded that there are no Federally-listed threatened or endangered species in the area of the proposed drilling
and that no impact on such species is anticipated. See EA at 18, 47, 56. In addition, the Forest Service conducted a Biological Evaluation in
conjunction with the assessment of the environmental impact of mineral leasing in the National Forest (contained in the FEIS). See id. at 56. This evaluation concluded that exploration within the entire area would
not affect any threatened or endangered species, either within that area
or downstream. See Letter from Forest Service to FWS, dated Sept. 13,
1988, at 1; Biological Evaluation, dated May 4, 1988, at 12-13.

Hansen has provided no evidence to the contrary. She argues that wetlands provide habitat for such species and therefore, since wetlands are present in the drilling area, they must also contain threatened and endangered species. See Statement of Reasons (SOR), Laura E. Hansen, at 2. The flawed logic of that allegation is not sufficient to prove the presence of any endangered species. Moreover, BLM has made adequate provision for protection of wetlands. See EA at 54. Nor has Hansen offered any evidence that threatened or endangered species would be affected in any way by exploratory drilling. We conclude that she has failed to establish any violation of the ESA since there is nothing to indicate that the approved drilling is likely to jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of its critical habitat. See Oregon Natural Resources Council, 116 IBLA 355, 366-67 (1990).

The State and Davis and Wilson also contend that the Assistant District Manager erred when he failed to consider the current poor market for lead when he decided to permit the proposed exploratory drilling. They argue that failure to consider the lack of market demand meant that he did not properly balance Doe Run's need to explore for lead against the interest
of others in preserving the environment from harm. The Assistant District Manager concluded that the poor market for lead was "irrelevant" because
the question whether the deposit underlying the subject land could be economically mined could not be determined until the deposit had been discovered and outlined by systematic exploratory drilling (Decision Record, Appendix 2, at 1).

The contention that BLM failed to consider the lack of demand for
lead is premised on an assertion that this failure was a violation of
NEPA. NEPA requires, however, that BLM consider the environmental impact
of exploratory drilling. Drilling will have no impact on the market demand for lead since it will not result in the extraction and marketing of any mineral that would meet that demand. That will only occur with mining.
It is therefore premature to require BLM to consider the extent to which market demand will be satisfied by the permitted activity. See Stanford R. Mahoney, supra at 386-87.

The State goes further with this argument, contending that BLM is required by NEPA to disapprove of drilling where the public benefits of exploring for and subsequently developing a lead deposit, including satisfaction of the demand for lead, are outweighed by the environmental harm

that would result from exploration and mining. See State of Arkansas, SOR at 5. This argument overlooks the fact that nothing in NEPA requires BLM to reach a particular result in the course of deciding whether to permit a proposed action; the statute only requires that a Federal agency fully consider the environmental consequences of Federal action. See Oregon Natural Resources Council, supra at 361 n.6; State of Wyoming Game & Fish Commission, 91 IBLA 364, 367 (1986).

NEPA does not require that BLM determine that the public benefits of drilling for and extracting lead outweigh any harm to the environment from such activity in order to permit that activity. We turn therefore to the question if, quite apart from whether NEPA was satisfied, the Assistant District Manager properly approved the proposed drilling as an exercise of his discretionary authority. His decision will be upheld so long as it was based on a consideration of all relevant factors and is supported by the record. See William R. Franklin, 121 IBLA 37, 40 (1991).

The extent to which there is a demand for lead is surely a relevant factor in deciding whether to permit exploration for lead on Federal land. There seems little reason for the United States to permit any form of lead exploration, no matter how potentially benign, if there is absolutely no demand for lead. There is, however, no suggestion in the record before
us that there is no market for lead. The record is silent concerning the current level of market demand. Nonetheless, both the Assistant District Manager and appellants have indicated that, while the market was "poor," there was a market of some sort. See also Draft EIS at 56-59. It seems most unlikely that Doe Run would be interested in pursuing exploration unless there were the possibility that any discovered lead deposit could find a market in the foreseeable future. We must assume, of necessity,
that there is some demand for lead.

Beyond that, there is no need for BLM to analyze the economics of mining in the course of deciding to permit exploration. Such analysis will, as the Assistant District Manager indicated, be undertaken following discovery and delineation of an ore body in order to determine whether to issue a preference right lease because a valuable deposit has been uncovered. See 43 CFR 3563.3. The record shows that BLM considered potential harm to the environment when drilling exploration was approved. We can safely presume that the Assistant District Manager weighed this potential for harm against the need for lead. We will not overturn his decision where it was based on an analysis of all relevant factors and is supported by the record. That appellants would reach a different result on the basis of such a balancing does not justify reversal. See William R. Franklin, supra at 40.

Therefore, we conclude that the Assistant District Manager properly approved Doe Run's plan to drill up to 20 exploratory holes within the Mark Twain National Forest in southeastern Missouri.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge